

sanctions available under Fed. R. Civ. P. 37(b)(2)(A), including treating the violation as contempt of court. See Fed. R. Civ. P. 16(f)(1).

When considering sanctions under Rule 16(f), courts have considered the factors applied in cases arising under Rule 37(b). See, e.g., Cohen v. U.S. Dep't of Just./ATF, 2017 WL 149987, at *2 (S.D.N.Y. Jan. 13, 2017); Martin v. Giordano, 2016 WL 4411401, at *15 (E.D.N.Y. Aug. 18, 2016). These factors are:

- (1) the willfulness of the non-compliant party or the reason for noncompliance;
- (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of noncompliance.

S. New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 144 (2d Cir. 2010) (citation and quotation marks omitted). “In deciding whether a sanction is merited, the court need not find that the party acted in bad faith. The fact that a pretrial order was violated is sufficient to allow some sanction.” Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 53 (2d Cir. 2018) (citation and quotation marks omitted). Where a violation has been found, a district court “has wide discretion in imposing sanctions.” World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp., 694 F.3d 155, 159 (2d Cir. 2012) (interpreting Fed. R. Civ. P. 37(b)(2)(A)) (internal quotation marks omitted).

“The purpose of the sanctions is three-fold: (1) to ensure that a party will not benefit from its own failure to comply; (2) to obtain compliance with the particular order issued; and (3) to serve as a general deterrent effect on the case and on other litigants as well.” Fonar Corp. v. Magnetic Plus, Inc., 175 F.R.D. 53, 56 (S.D.N.Y. 1997). As the Supreme Court has stated, sanctions for violating discovery orders “must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.” Roadway Exp., Inc. v. Piper, 447 U.S. 752,

763-64 (1980) (internal alterations and quotation marks omitted); accord Xu v. UMI Sushi, Inc., 2016 WL 3523736, at *4 (S.D.N.Y. June 21, 2016).

Here, defendant's attorneys have repeatedly failed to comply with Court-ordered deadlines. The theme has been consistent: Mr. Rodriguez fails to comply with a Court-ordered deadline due to a claimed personal circumstance and the deadline is allowed to pass without any application for an extension. The Court has directed on several occasions that both Mr. Rodriguez and Mr. Polizzotto must be responsible for ensuring that either deadlines are met or, if necessary, that an extension is sought and granted. For example, on August 23, 2022, the Court noted that "[t]here are two attorneys on this case and if a court order cannot be complied with, all counsel are responsible for seeking an extension rather than violating the Court's order." Memorandum Endorsement, filed Aug. 23, 2022 (Docket # 159). On October 28, 2022, at a conference both Mr. Rodriguez and Mr. Polizzotto were directed to attend, see Memorandum Endorsement, filed Oct. 26, 2022 (Docket # 166), the Court again highlighted the obligations of both attorneys in meeting the Court's deadlines. See Transcript, filed Nov. 1, 2022 (Docket # 170) ("10/28 Tr."), at 13:12-22 ("Well, I mean, the conduct in front of me has been outrageous. . . . You know, every now and then, something personal happens, but that usually happens once, and then someone else takes control. But to happen literally over and over and over again, you know, we've all been through personal matters. That's why we have colleagues. We don't blow off court orders."). In that instance, plaintiff had filed a motion to compel discovery after defendant had allegedly not produced certain responsive documents. See Letter, filed July 13, 2022 (Docket # 150). Defendant initially failed to respond to plaintiff's letter in accordance with paragraph 2.A of the Court's Individual Practices, see Order, filed July 19, 2022 (Docket # 151), and later filed a letter, see Letter, filed July 21, 2022 (Docket # 152), that "fail[ed] to respond to

the issues raised by plaintiff,” see Order, July 26, 2022 (Docket # 153). Treating plaintiff’s request as unopposed, the Court directed defendant to “search all documents in repositories under his custody and control” and “provide plaintiff a sworn statement detailing his efforts to comply with this Order.” Id. at 1-2. The Court granted an extension to provide the sworn statement, see Memorandum Endorsement, filed Aug. 4, 2022 (Docket # 155), but following the extended deadline, plaintiff informed the Court that no such statement had been provided, see Letter, filed Aug. 19, 2022 (Docket # 156). Finally, nearly a month after the July 26, 2022 order had been issued, Mr. Rodriguez conceded that he had not complied with it and that the cause was certain personal circumstances. See Letter, filed Aug. 22, 2022 (Docket # 157). Following yet another letter from plaintiff alleging that the Court’s July 26, 2022 order had not been complied with, see Letter, Sept. 27, 2022 (Docket # 161), the Court scheduled a conference, see Order, filed Oct. 21, 2022 (Docket # 163). At the conference, Mr. Rodriguez indicated that no further search for responsive documents was done following the issuance of the July 26, 2022 order despite the order directing such a search, see 10/28 Tr. 6-10. Given the lack of compliance with the July 26, 2022 order, the Court directed that either defendant or one of defendant’s attorneys “file a sworn statement . . . detailing all efforts, in the past or ongoing, to produce documents responsive to plaintiff’s document requests, . . . include[ing] any efforts undertaken since July 26, 2022.” Order, filed Oct. 28, 2022 (Docket # 169). After reviewing defendant’s submission, the Court concluded that “it [was] clear that defendant failed to comply with the Court’s July 26, 2022 Order.” Order, filed Dec. 7, 2022 (Docket # 180).

Before the Court is another example of a failure of both attorneys to take responsibility for missing a Court-ordered deadline. At a discovery conference held on December 21, 2023, the Court ordered defendant to produce certain privilege log entries “within one week,” or

December 28, 2023. See Transcript, filed Jan. 2, 2024 (Docket # 213), at 25. Mr. Rodriguez specifically agreed that it would be “[n]o problem” to meet this deadline. Id. On January 2, 2024, several days after the December 28, 2023 deadline for production of these logs, plaintiff filed a letter indicating that the Court’s order had been violated. See Letter, filed Jan. 2, 2024 (Docket # 215). In his response, Mr. Rodriguez admitted that he failed to comply with the Court-ordered deadline and asserted that it was the result of a “family matter.” See Letter, filed Jan. 3, 2024 (Docket # 216). As was true of Mr. Rodriguez’s initial responses in similar situations, he made no apology for missing the deadline and instead used the occasion to attack the plaintiff. See id. at 1 (“[A]s has been typical for the Plaintiff, he is reaching for any advantage he can obtain because his case is lacking on the merits.”).

Because the Court had previously indicated that “if a court order cannot be complied with, all counsel are responsible for seeking an extension rather than violating the Court’s order,” Memorandum Endorsement, filed Aug. 23, 2022 (Docket # 159), the Court’s order to show cause specifically directed as follows: “if there is a claim by Mr. Rodriguez that he was unable to make a timely application [for an extension of the Court-ordered deadline], both attorney affidavits must include a disclosure of any efforts by the attorney signatory to communicate with the other attorney regarding the Court-ordered deadline and the need to obtain an extension,” OSC at 2.

In Mr. Rodriguez’s affidavit, he describes a personal circumstance that he contends made him unable either to comply with the Court’s order or, implicitly, to seek an extension of the deadline. But neither Mr. Rodriguez’s affidavit nor Mr. Polizzotto’s affidavit discloses any efforts by the attorneys to communicate with each other during this time period. Left unexplained is why Mr. Polizzotto was unaware of the Court-ordered deadline and why Mr. Rodriguez could not have taken one moment to reach Mr. Polizzotto during his family

emergency and instruct him to make the application to the Court. Thus, the attorneys' explanations fail to grapple with the fact that both attorneys are responsible to ensure compliance with court orders. Of course, regardless of when Mr. Rodriguez informed Mr. Polizzotto of his emergency, Mr. Polizzotto was equally responsible for taking action to ensure compliance with the Court's order.

The inattention to court orders has also occurred with respect to the scheduling of the "vendor conference" ordered by the Court on December 21, 2023. See Order, filed Dec. 21, 2023 (Docket # 212). In that Order, the Court directed that defendant was required to arrange for a conference with discovery vendors "forthwith." Id. Mr. Rodriguez has since admitted that he "did not reach out to anyone at Setec [one of the vendors who had to be at the conference] until the early evening of January 9" due to presumably the same personal circumstances. Letter, filed Jan. 11, 2024 (Docket # 225). This failure, however, continued well beyond the apparent conclusion of those circumstances. Additionally, there is no evidence that Mr. Polizzotto attempted to assist in complying with the Court's order.

The Court is confounded as to how to get Mr. Rodriguez and Mr. Polizzotto to take their obligations to the Court and to the discovery process seriously. Indeed, as the Court stated over a year ago, we are "running out of tools in the toolbox" to ensure defendant complies with its obligations. 10/28 Tr. 10. Considering the aforementioned factors, the pattern of delay and noncompliance weighs heavily in our determination that sanctions are appropriate. In determining the appropriateness of sanctions, a court "may consider the full record in the case." See In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 2023 WL 3304287, at *5 (S.D.N.Y. May 8, 2023) (citation and internal quotation marks omitted). The pattern displayed by the attorneys speaks to all four of the factors. The attorneys' conduct is willful in the sense

that they have no processes in place to ensure compliance with Court-ordered deadlines or even to do the bare minimum of seeking an extension. See Gilead Scis., Inc. v. Safe Chain Sols. LLC, 2023 WL 4991574, at *3 (E.D.N.Y. July 19, 2023) (the party's noncompliance was found willful after a "pattern of delay, failure to comply with his discovery obligations, and an order from this Court that he do so"), adopted by 2023 WL 5024696 (E.D.N.Y. Aug. 7, 2023). Our previous warnings that Mr. Polizzotto must equally be responsible for the conduct in this case, and his subsequent failure to take responsibility, suggest that sanctions at this point are necessary. The pattern of noncompliance with court orders began months ago. Finally, while we have not previously warned specifically of the consequences of noncompliance, we have explicitly informed the attorneys that their conduct was unacceptable. Thus, a sanction under Rule 16(f) is appropriate.

We have considered the imposition of a fine on the attorneys in this case as it is their own conduct and not that of their client that is the subject of the Court's consideration. While a fine is not one of the sanctions listed in Rule 16 or Rule 37, case law makes clear that sanctions under Rule 16 may "include a fine payable to the Clerk of the Court." Bouveng v. NYG Cap. LLC, 2017 WL 6210853, at *5 (S.D.N.Y. Dec. 7, 2017) (citation and internal quotation marks omitted) (collecting cases). Indeed, case law is replete with instances of fines imposed pursuant to Rule 16 or the related portion of Rule 37. See Miltope Corp. v. Hartford Cas. Ins. Co., 163 F.R.D. 191, 194-195 (imposing a fine of \$1,000 after plaintiff failed to respond to defendant's discovery requests for one month and failed to seek an extension despite "the clear warning it received of the consequence of non-compliance"); Chevrestt v. Barstool Sports, Inc., 2020 WL 2301210, at *3-5 (S.D.N.Y. May 8, 2020) (imposing a fine of \$3,000 and legal fees after attorney failed to timely file an affidavit of service and provide licensing information in a copyright case);

Friedman v. SThree PLC., 2017 WL 4082678, at *14 (D. Conn. Sept. 15, 2017) (imposing a fine of \$150 per day, totaling \$1,350, for noncompliance with a court order); McConnell v. Costigan, 2002 WL 313528, at *15 (S.D.N.Y. Feb. 28, 2002) (imposing a fine of \$1,000 due to a party's "lateness in submitting their opposition papers and in paying the monetary sanction imposed" by the court); Chi v. Age Grp., Ltd., 1995 WL 564159, at *5-6 (S.D.N.Y. Sept. 22, 1995) (imposing a fine of \$3,500, payable to defendant's counsel, for failing to seek extensions on discovery and comply with court-ordered deadlines). Given the attorneys repeated violations, a fine would be amply justified.

Nonetheless, we will elect to exercise our discretion to forgo the imposition of a monetary fine. Accordingly, the Court orders the following lesser sanctions tailored specifically to impress upon the attorneys their need to take their discovery obligations and court orders seriously:

(1) Mr. Rodriguez and Mr. Polizzotto are both directed to attend all future Court conferences in this case and to make themselves equally responsible and available for all aspects of the litigation of this case, including responding to any requests for conferrals by plaintiff as required by paragraph 2.A of the Court's Individual Practices.

(2) Beginning on January 26, 2024, and continuing every Friday thereafter for the duration of the discovery period, Mr. Polizzotto and Mr. Rodriguez shall transmit to plaintiff a letter signed by both attorneys that describes all efforts then currently underway to respond to any discovery requests from plaintiff and that reference any applicable deadlines, whether agreed-upon or court-ordered. The purpose of the letter is to maximize the information available to plaintiff as to the status of discovery and to ensure that both attorneys are aware of all discovery obligations and deadlines, whether court-ordered or otherwise. If plaintiff finds a particular letter to be incorrect or inadequate, plaintiff shall contact the attorneys directly to resolve the matter before involving the Court.

We expect that these measures will ensure that Mr. Rodriguez and Mr. Polizzotto fulfill their obligations to the Court and to the discovery process. They are warned that any future

violations of court orders or discovery obligations will result in additional sanctions, including but not limited to a fine.

SO ORDERED.

Dated: January 25, 2024
New York, New York



GABRIEL W. CORENSTEIN
United States Magistrate Judge